

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1377

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

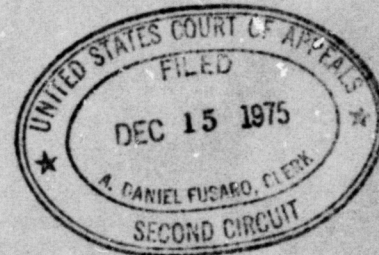
Appellee,

-against-

ANGELO SEIJO,

Appellant.

Docket No. 75-1377



APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.
THE LEGAL AID SOCIETY,
Attorney for Appellant
ANGELO SEIJO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG
Of Counsel

PAGINATION AS IN ORIGINAL COPY

JUDGE MAC MAHON

74 CRIM.

JUDGE BRIEAT
606

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Alan R. Kaufman, AUSA
NICHOLAS HILDEBRANDT-1-4	264-6433
LEONARD TORRES-1-4	
ANGELO SEIJO-1,4,5 & 6	
JAMES DI DOMENICO-1&2	
	For Defendant:

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(07)					
Fine, \$5-3-1, 2, 3		10/17/74	Thomas	✓	
Clerk,		10/17/74			✓
Marshal,					
Attorney,					
Commissioner's Court 21					
Witnesses					
Consp. to viol. Fed. Narcotic Laws.(Ct.1)					
Distr. & possess. w/intent to distr. Heroin, I. (Cts.2-5)					
Carrying gun dur. commission of felony.(Ct.6)					
(Six Counts)					

DATE	PROCEEDINGS
6-14-74	Filed indictment.
6-18-74	Deft. Hildebrandt appears (Atty. Present). Deft. pleads N/G. 10 days for Motions. Bail fixed by court at \$20,000 personal recognizance bond secured by \$1500 cash. Deft. remanded in Lieu of bail. Knapp, J.
	Deft. Seijo appears (Atty. Present). Deft. pleads N/G. Bail fixed by court at \$10,000 Personal Recognizance Bond secured by \$500 cash. Deft. remanded in Lieu of Bail. Knapp, J.
	Deft. DiDomenico Appears (Atty. Present) Deft. pleads N/G. Bail fixed by court at \$20,000 Personal Recognizance Bond secured by \$1,000 cash. Deft. remanded in Lieu of bail. Knapp, J.
	OVER

JUDGE BRIEANT

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
5-18-74	DEFT. Torres appears (Atty. Present) Deft. pleads N/G. Bail continued as previously fixed by the Magistrate at \$10,000 cash. Knapp, J. Case assigned to Judge Mac Mahon for all purposes.		
6-24-74	Marked off as to deft. Torres. Knapp, J.		
6-19-74	JAMES DI DOMENICO= Filed Appearance Bond in the sum of \$20,000.00 secured by \$1,000.00 Cash - Receipt #374/1 - Name of surety, Joseph Di Domenico - Clerk.		
7-2-74	Pre-Trial Conf. held. Date set for Trial, 7-29-74.		
7-8-74	NICHOLAS HILDEBRANDT= Filed Notice of Appearance of Atty. Sidney M. Offer, 415 Lexington Ave, NYC 10017 Tel#661-8464.		
7-8-74	JAMES DI DOMENICO= filed notice of Appearance of Atty. Benjamin Gold, 29 West 34th Street, N.Y.C. Tel # WI 7-1541.		
7-10-74	Pre-Trial Conference held.		
7-11-74	Filed sealed envelope to be placed in Vault 602 and there retained until the further order of this Court. So ordered-MacMahon, J.		
7-2-74	LEONARD TORRES= Filed Defts Notice of Motion for Dismissal of Indictment and a Bill of Particulars. (N/M)		
7-2-74	LEONARD TORRES= Filed MEMO ENDORSEMENT on the above Notice of Motion. Motion disposed of as per record at conference held 7-2-74. SO ORDERED--MacMAHON, J.		
7-29-74	LEONARD TORRES= (Atty. present) Changes plea of NOT GUILTY, and pleads GUILTY TO Ct. 1. Pre-sentence report ordered. Date of sentence 10-1-74, @ 10:00 AM, Courtroom #518 --- MacMAHON, J.		
7-29-74	Trial begun for Deft's HILDEBRANDT, SEIJO and DI DOMENICO.		
7-30-74	Trial continued and concluded. Jury, finds HILDEBRANDT GUILTY on all Counts. Jury finds SEIJO GUILTY on Ct. 1 & 4., NOT GUILTY on Count 5. Jury finds DI DOMENICO GUILTY on Counts 1 & 2. P.S.R. ordered. Defts motion to set aside verdict, DENIED.		

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
7-30-74	(Cont'd) Deft. SEIJO and DI DOMENICO bail revoked and the Defts REMANDED. date of Sentence 10-1-74 @ 10:00 AM--MacMahon, J.
7-31-74	LEONARD TORRES=Filed Deft's acknowledgment of his constitutional rights.
8-1-74	ALL DEFT'S=Filed plttf's request to Charge.
8-14-74	NICHOLAS HILDEBRANDT= Filed Affdvt and Constant Order to allow deft to visit his brother Ralph Hilderbrandt, in the intensive Care Unit at the Metropolitan Hospital at 96th St. & 2nd Ave, NYC on 8-16-74.
6-19-74	ANGELO SIEJO= Filed Appearance Bond for the sum of \$10,000.00 Cash- Receipt-acknowledged by the Clerk.
8-29-74	Filed transcript of record of proceedings dated 7-30-74
9-5-74	Filed Transcript of record of proceedings dated 7-29-74
10-1-74	ANGELO SEIJO=Filed Notice of Appeal to USCA from Final Judgment ent.10-1-74.. Notice Mailed to U.S. Atty & Deft: J.H. Memo-End=Leave to appeal in FORMA PAUPERIS is Granted. So Ordered. MacMahon, J.
10-4-74	NICHOLAS HILDEBRANDT=Filed Deft's Notice of Appeal to USCA from J ^u dg. & conviction herein on 10-1-74...Notices Mailed 10-7-74 to:Deft. US Atty's Office. Foley Sq.
10-1-74	JAMES DI DOMENICO=Filed Judgment & Commitment...IT IS ADJUDGED that the deft. (Atty Benjamin Gold Present) is hereby committed to the custody of the ATTORNEY GENERAL for imprisonment for a period of FIVE (5) YEARS, Special Parole on each of counts 1 and 2 to run concurrently with each other.-MacMahon, J. (C.S.)
10-1-74	NICHOLAS HILDEBRANDT=Filed Judgment(Atty. Sidney Offer Present)that the deft. is hereby committed to the custody of the Atty. General for imprisonment for a period of FIFTEEN (15) YEARS, and THREE (3) YEARS, Special Parole on each of counts 1, 2, 3, and 4 to run concurrently with each other.-MacMahon, J. (C.S.)
10-1-74	ANGELO SEIJO=Filed Judgment(Atty.Murray Mogel-Legal Aid-Present) that the deft. is committed to the custody of the Attorney General for imprisonment for a period of FIFTEEN (15) YEARS, and THREE (3) YEARS, Special Parole on each of counts 1 & 4 to run concurrently with each other. Count 6 dismissed on motion of deft's counsel and on consent of the Govt.--MacMahon, J. (C.S.)
10-1-74	LEONARD F. TORRES=Filed Judgment & Order Of Probation(Atty.Robert Leighton,Present) that the imposition of sentence on count 1 suspended. Deft. placed on probation for a period of FIVE (5) YEARS, subject to the standing probation order of this Court. Special Condition of probation is that the deft. be required to participate in a community base drug treatment program implemented by The Osborne Association, 114 East 30 St., N.Y. and under the auspices of the Probation Dept, U.S. District Court, Southern District of N.Y. Court 2,3,4, are dismissed on motion of deft's counsel with the consent of the Government. MacMahon, J. (cs)
10-16-74	ANGELO SEIJO= Filed CJA-23 - Financial Affidavit.

(Cont'd on Page #4)

JUDGE BRIEANT 5/2

DATE	PROCEEDINGS	Date Order Judgment N
17-74	JAMES DI DOMENICO= Filed MEMO ENDORSEMENT on Deft letter dated 9-13-74 requesting a reduction of sentence - The Motion in all respects is DENIED - SO ORDERED - MacMAHON, J. (Pro-Se to mail notice)	
18-74	Filed the following papers rec'd from Magistrate Raby (Mag#74-738)= 4 Docket Entry Sheets - Criminal Complaint - Disposition Sheet - 4 Financial Affdvs - CJA23 - 4 Temporary Commitments - Appearance Bond for LEONARD TORRES, in the amount of \$10,000. Cash Bail dated 6-10-74 - Notice of Appearance for Deft JAMES DI DOMENICO & LEONARD TORRES - Appointment of Counsel for Deft LEONARD TORRES, By Robert Leighton, 15 Park Row, NYC 10038, and for Deft NICHOLAS HILDEBRANDT, by Sidney Offer, 415 Lex. Ave, NYC 10017.	
17-74	JAMES DI DOMENICO= Filed commitment & entered return, Deft. delivered to WARDEN, F.D.H., NYC ON 10-1-74	
17-74	NICHOLAS HILDEBRANDT= Filed commitment & entered return, Deft. delivered to WARDEN, F.D.H., NYC ON 10-1-74	
21-74	LEONARD TORRES= Mailed Original CJA copy 1 to the A.O., Wash, D.C. for payment - MacMAHON, J.	
6-74	ANGELO SELJO= Filed notice of Supplemental Record on Appeal, that same has been certified and transmitted to the U.S.C.A., for the 2nd Circuit.	
6-74	Filed transcript of record of proceedings, dated 7-29-74	
6-74	Filed transcript of record of proceedings, dated 7-2-74	
6-74	Filed transcript of record of proceedings, dated 7-10-74	
6-74	Filed transcript of record of proceedings, dated 7-11-74	
17-74	N. Hildebrandt- filed remand dated 6/17/74.	
29-74	PRE-TRIAL CONFERENCE HELD BY June 30, 1974	
16-74	Filed Affdvt of Thomas M. Fortuin - Re. discovery.	
18-74	ANGELO SELJO= Filed ORDER that Michael Young, Esq., The Legal Aid Society, Federal Defender services Appeals Unit, appellate attorney for Deft, be permitted to read the pre-sentence report prepared on the Deft. --MacMAHON, J. (m/n)	
81-74	Filed notice that the supp. record on appeal has been certified & Trans to U.S.C.A.	
5-75	NICHALOS HILDEBRANDT= Filed plttf's MEMORANDUM #41733 regarding CJA-20 submitted by Sidney Offer, Esq, deft's atty. The Court claims that Sidney Offer is entitled to \$932.50. However, since he has already received \$150.00 for his services, the net amount due him is \$782.50. Submit an appropriate voucher in accordance with the foregoing memorandum within ten (10) days. SO ORDERED. --MacMAHON, J.	
	NICHOLAS HILDEBRANDT= Mailed original CJA Copy 2 to the A.O., WASH, D.C. for payment--MacMahon, J.	
	Filed CJA Copy #5 appointment of counsel, Sidney M. Offer, 415 Lexington Ave, NYC 10017.	
2-75	Reassigned to JUDGE BRIEANT FROM JUDGE MAC MAHON m/n	
12-75	ANGELO SELJO= Filed Gov't affdvt for Writ of Habeas Corpus -Writ Issued -Ret. 5-15-75.	
12-75	NICHOLAS HILDEBRANDT= Filed Gov't affdvt for Writ of Habeas Corpus -Writ issued - Ret. 5-15-75.	

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS
11-1-74	ANGELO SEIJO=Filed commitment & entered return, Deft delivered to Warden, U.S. Penitentiary, Lewisburg, Pa. on 10-25-74.
11-13-74	JAMES DI DOMENICO=Filed commitment & entered return, Deft delivered to Warden, Federal Reformatory, Petersburg, Va on 11-6-74.
11-1-74	NICHOLAS HILDERBRANDT=Filed commitment & entered return, Deft delivered to Warden, U.S. Penitentiary, Lewisburg, Pa. on 10-25-74.
6-13-75	HILDERBRANDT & SEIJO=Filed Opinion of True Copy of Order from USCA...That the judgments of SD of NY are hereby reversed and that the actions be and they hereby are remanded to said Dist. Court for further proceedings in accordance with the opinion of this Court....Fusaro, Clerk USCA mm
6-19-75	ANGELO SEIJO=Deft(jack Lipson) presnt. Deft. remanded in lieu of bail fixed at \$5,000 cash or surety.....Biramant,J.
6-19-75	NICHOLAS HILDERBRANDT=Deft. (Sidney Offer) present. Writ adj'd to 7-30-75..Brieant
6-20-75	Reassignment from Mac Mahon J. to Brieant J.
6-25-75	ANGELO SEIJO=Filed Govt's Trial Memo.
6-26-75	ANGELO SEIJO= Filed REMAND dated 6-19-75.
7-1-75	ANGELO SEIJO= Filed Writ of Habeas Corpus with Marshal's return. Writ adj'd to 6-19-75 at 2 PM--BRIEANT,J.
9-15-75	ANGELO SEIJO= Filed Deft's Trial Memorandum.
9-16-75	NICHOLAS HILDERBRANDT= Deft (Atty S.N. Offer) withdraws plea of NOT GUILTY and pleads GUILTY to COUNTS 3 & 4. P.S.I. ordered. Sent. adj'd to 10-14-75.
9-16-75	ANGELO SEIJO= Jury Trial begun.(Attys Jack Lipson & Richard I Janvey)
9-17-75	Trial Cont'd.
9-18-75	Trial Cont'd.
9-19-75	Trial cont'd & concluded. Jury Verdict GUILTY on COUNTS 1 & 4. P.S.I. ordered. Sent adj'd to 10-24-75. Bail cont'd.--BRIEANT,J.
9-22-75	SEIJO=Filed Govt's Requests to Charge.
10-14-75	NICHOLAS HILDERBRANDT= Filed Judgment & Commitment Order= The Deft is hereby committed to the custody of the Atty General for imprisonment for a period of EIGHT (8) YEARS on each of COUNTS 3 and 4, to run concurrently with each other. Pursuant to Section 841 of Title 21, U.S. Code, Deft is placed on SPECIAL PAROLE for a period of three (3) YEARS, to commence upon expiration of confinement. COUNTS 1 and 2 are DISMISSED on motion of Deft's counsel with consent of the Gov't. The Court pursuant to Section 4082 of Title 18, U.S.Code, recommends that the Atty General arrange to have this sentence served concurrently with the State sentence imposed by Justice Zimmerman in a State facility in so far as the sentence can be served concurrently. The balance of the sentence, if any, may be served in an institution to be designated by the Attorney General. Writ Satisfied.--BRIEANT,J.

DATE	PROCEEDINGS	Date Order Judgment N
10-24-75	ANGELO SEIJO-Bail to be rewritten for appeal \$5,000 Cash or Surety but with condition that deft. call Public Defender Service every Tuesday....Brieant, J.	
10-24-75	ANGELO SEIJO- Remand Issued.	
10-24-75	ANGELO SEIJO-Filed Personal Surety Recognizance Bond Pending Appeal in the sum of \$5,000.00-Acknowledged by the Clerk.	
10-24-75	ANGELO SEIJO-Filed JUDGMENT & COMMITMENT ORDER-Deft is committed to the custody of the ATTY GEN for imprisonment for a period of FIFTEEN(15) YEARS on each of counts 1 and 1 and 4, to run concurrently with each other. Pur to Sec 241 of Title 21 U.S. Code, deft. is place on Special Parole for a period of THREE (3) YEARS, to commence upon upon expiration of confinement. Deft. is continued on present bail until he posts bail pending appeal fixed in the amount of \$5,000 cash or surety to be con-signed by his brother in law Christian Volpe and deft is to call the Public Defender every Tuesday.....Brieant, J.	
10-28-75	ANGELO SEIJO-Filed Deft's Notice of Appeal to USCA from Final Judgment of 10-24-75. Notice mailed to Deft & US Atty's Office. on 10-29-75.....Deft to proceed on appeal in forma pauperis is granted. ...Brieant, J. 10-24-75.	
10-30-75	ANGELO SEIJO-Filed Deft's Requests to Charge.	
11-6-75	N. HILDEBRANDT= Filed commitment & entered return, Deft delivered to MCC - N Y FOR GET TO LEWISBURG - LEWIS PD - 11-14-75	
11-13-75	N. HILDEBRANDT= Mailed original CJA Copy #1 to the A.O., WASH, D.C. for payment.---BRIEANT, J.	
11-13-75	N. HILDEBRANDT= Filed CJA Appointment of Counsel, Sidney M. Offer, 415 Lexington ave, N.Y.C. 10017.	

ARK:ew
74-1839UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORKJUDGE ~~MAGNAN~~
JUDGE BRIEANT74 ~~CR~~ 606

UNITED STATES OF AMERICA,

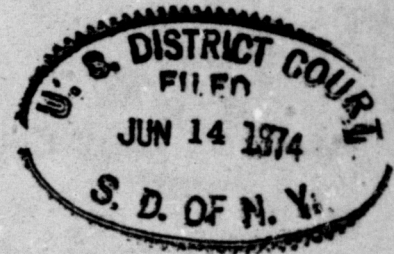
-v-

NICHOLAS HILDEBRANDT,
LEONARD TORRES,
ANGELO SEIJO, and
JAMES DI DOMENICO,

Defendants .

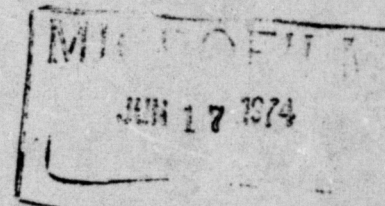
: INDICTMENT

: 74 Cr.



The Grand Jury charges:

1. From on or about the 1st day of April, 1974, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York,

NICHOLAS HILDEBRANDT,
LEONARD TORRES,
ANGELO SEIJO, and
JAMES DI DOMENICO,

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 11th day of April, 1974, the defendants LEONARD TORRES and JAMES DI DOMENICO were in the vicinity of Latting and Edward Avenues, Bronx, New York.

2. On or about the 18th day of April, 1974, the defendant LEONARD TORRES was in the vicinity of Latting and Edwards Avenues, Bronx, New York.

3. On or about the 5th day of June, 1974, the defendants NICHOLAS HILDEBRANDT, LEONARD TORRES and ANGELO SEIJO were in the vicinity of Southern Boulevard and Fordham Road, at the Howard Johnson's Restaurant in the Bronx, New York.

(Title 21, United States Code, Section 846.)

SECOND COUNT

The Grand Jury further charges:

On or about the 11th day of April, 1974, in the Southern District of New York, LEONARD TORRES, JAMES DI DOMENICO, and NICHOLAS HILDEBRANDT, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 38.2 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

THIRD COUNT

The Grand Jury further charges:

On or about the 18th day of April, 1974, in the Southern District of New York, LEONARD TORRES and NICHOLAS HILDEBRANDT, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 161.5 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

FOURTH COUNT

The Grand Jury further charges:

On or about the 5th day of June, 1974, in the Southern District of New York, LEONARD TORRES, NICHOLAS HILDEBRANDT and ANGELO SEIJO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 259.5 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); and Title 18, United States Code, Section 2.)

FIFTH COUNT

The Grand Jury further charges:

On or about the 5th day of June, 1974, in the Southern District of New York, ANGELO SEIJO, the defendant, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 34.0 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

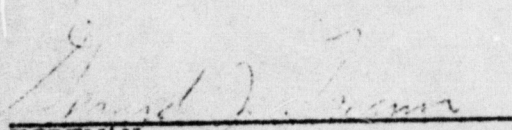
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74-1839


SIXTH COUNT

The Grand Jury further charges:

On or about the 5th day of June, 1974, in the Southern District of New York, ANGELO SEIJO, the defendant, did unlawfully, wilfully and knowingly carry a firearm during the commission of a felony, for which he could be prosecuted in a court of the United States to wit, the offenses charged in Counts One, Four and Five of this indictment.

(Title 18, United States Code, Section 924(c)(2).)


FOREMAN


PAUL J. CURRAN
United States Attorney

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

NICHOLAS HILDEBRANDT,
LEONARD TORRES,
ANGELO SEIJO, and
JAMES DI DOMENICO,

Defendants.

INDICTMENT

Violation of Title 18, U.S.C.;
Sections 2 and 924(c)(2); Title
18, U.S.C.; Sections 812, 841(a)(1),
and 846.

PAUL J. CURRAN

United States Attorney.

TRUE BILL

Foreman.

FPI-85-2-19-71-20M-6950



JUDGE BRIANT

JUN 18 1974

Def't Hildebrandt appears (atty
Sedney offer Present) Def't pleads N/G.
10 days for motions. Case assigned to
Proc Naha, J. Bail Fixed by Court
at \$2,000 PRB secured by \$1500 Cash.
Def't remanded in lieu of Bail
Knapp, J.

JUN 18 1974

Def't Seijo appears (atty
Murray Knapp, J. offer and Present)
Def't pleads N/G. Bail Fixed by
Court at \$10,000 PRB secured by \$500
Cash. Def't remanded in lieu of Bail
Knapp, J.

JUN 18 1974

Def't Di Domenico appears
(atty J. Gold present) Def't pleads N/G.
Bail Fixed by Court at \$20,000 PRB
secured by \$1,000 Cash. Def't remanded
in lieu of Bail
(same) Knapp, J.

JUN 18 1974

Deft Torres appears (atty Robert Leys
Present) Deft Pleads N/G. But Can't as
previously fixed by the Magistrate at \$19.00
Cash

m R

Knapp, J.

JUN 24 1974

Marked off as to Deft Torres
Knapp, J.

7-2-74 Pre-Trial Conf. Held. Date set for trial 7-29-74

W

7-29-74 Deft Demand Torres Atty present ~~for~~ change plea
of not guilty, and pleads guilty to Count 1.

Pre sentence report ordered. Date of sentence 10-1-74

at 10 A.M. Courtroom 516 Grace Hall

7-29-74 T n n

W

7-29-74 Deft Leonard Torres Atty present ~~for~~ change plea
of not guilty, and pleads guilty to Count 1.

Pr. sentence report ordered. Date of sentence 10-1-74
at 10 AM. Counters 516 Grace Mabe J ~~W~~ W

7-29-74 Trial Begun. for depts Heldebrandt, Suyo, and
Di Domenico W

7-30-74 Trial continued and concluded.

Jury finds deft Heldebrandt guilty on all
cts.

Jury finds deft Suyo guilty on cts 1 and 4
not guilty on ct 5.

Jury finds deft Di Domenico guilty on ct 10

2. P. S. R. Caduel.

10/24/75 Met (Atty. Jack Lipson) present.

Sent to 15 yrs on cts. 1+4, to run
concurrently with ea other.

3 yrs. Special parole.

Bail cont. & anted deft's posts bail
pending appeal fixed in the

amount of \$5,000 cash or surety

to be co-signed by deft's brother-in-law

Christian Wipe & deft. to call Public

Defender every Tuesday.

Deft advised of right to appeal.

Wm

Def't motion to set aside verdict. Denied.

Def't says, and the sentence - Bail waived.
and the deft remanded.

Date of sentence 10-1-75 at 10A.M.

Wm

10-1-74 Deft Di Domenico (Atty present) sentence to
5 years, and 3 years special parole on cts 1 and 2
to run concurrently with each other

Wm. M. M. /

10-1-74 Deft Heldebrandt (Atty present) sentence to
15 years, and 3 years special parole on each
of cts 1, 2, 3, and 4 to run concurrently with
each other. Wm. M. M. /

10-1-74 Deft Seijo (Atty present) sentence to
15 years, and 3 years special parole
on cts 1 and 4 to run concurrently with
each other.

Ct 6 dismissed on motion of deft's counsel
and in consent of the Government.

10-1-74 Deft Torres (Atty present) sentence. Wm. M. M. /
Imposition of sentence on ct 1, suspended.

Deft placed on probation for a period of 5 years.

Special Condition of probation is that the deft be required
to participate in a community based drug treatment program
implemented by the Osborn Admin, and under the auspices
of the probation dept. Wm. M. M. /

1 rgh 120

2 United States of America

vs.

3 Nicholas Hildebrandt

4 Angelo Seijo

5 CHARGE OF THE COURT

6 (Brieant, J.)

7 --

8 THE CLERK: The Court is about to charge the
9 jury. Any spectator wishing to leave will do so now or
10 remain in their place until the completion of the Court's
11 charge.

12 THE COURT: Mr. Riano and members of the jury.
13 We are now at that stage in the trial where you will undertake
14 your final function of jurors and here you perform one
15 of the most sacred obligations of citizenship, and that is
16 acting as ministers of justice. You are to discharge this
17 final duty in an attitude of complete fairness and impartiality
18 and as was emphasized by me when you were first selected,
19 without bias or prejudice for or against the government or
20 the defendant as parties to this controversy. Let me state
21 the fact that the government is a party entitles it to
22 no greater consideration than that accorded to any other
23 party to a litigation. By the same token it is entitled
24 to no less consideration. All parties, individuals and
25 government alike, stand as equals before the bar of justice

1 rgh 121

2 in this court. Your final role here is to decide and pass
3 upon the fact issues in this case. You are the sole and
4 exclusive judges of the fact. You determine the weight of
5 the evidence; you appraise the credibility or truthfulness
6 of the witnesses; you draw the reasonable inferences from
7 the evidence and you resolve such conflicts as there may
8 be in the evidence. I shall later tell you how you determine
9 the credibility of witnesses. My final function is to instruct
10 you as to the law and it is your duty to accept these
11 instructions as to the law and to apply them to the facts
12 in the case as you may find them. Now, you are not to
13 consider any one instruction which I give you alone as
14 stating the law, but you must consider all my instructions
15 taken together as a whole.

16 With respect to any fact matter it is your
17 recollection, and yours alone, that governs. Anything that
18 the lawyers for the government or the defendant may have
19 said with respect to matters in evidence, whether during
20 the trial, a question, an argument or in summations, is
21 not to be substituted for your own recollection of the
22 evidence in the case. So, too, anything that I might say
23 during the trial or anything that I may refer to during
24 the course of these instructions as to any matter in evidence
25 is not to be taken in lieu of your own recollection. Now,

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2 the attorneys in the case not only have the right, but
3 it is their duty to make objection and to press whatever
4 legal theories and arguments. They are simply performing
5 their duty. Any evidence as to which an objection was sustained
6 by the court and any evidence ordered stricken out by the
7 court must be disregarded in its entirety. Put out of your
8 mind any exchange which may have occurred during the trial
9 between the lawyers or between any attorney and the court.
10 It is not my function to favor one side or the other or to
11 criticize anybody in any way whatsoever or to indicate to you,
12 the jury, that in any way I have any opinion as to the
13 credibility of any witness or as to the guilt or innocence
14 of the defendant. That is your function. It is yours alone
15 and I leave it entirely with you. So please don't assume
16 that I hold any opinion in any matters concerning this case
17 and please do not reach any conclusions that I may have some
18 attitude or that I may tend to favor one side or the other
19 in the case.

20 Of course as I told you when you were selected
21 the indictment here itself is no evidence of the crimes
22 charged. Instead an indictment is merely the method or
23 procedure under the law whereby persons accused of crimes
24 by a grand jury are brought into court to have their
25 guilt or innocence determined by a trial jury such as yourselves.

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2 Therefore the indictment must be given no evidentiary value,
3 but shall be treated by you only as an accusation. It
4 is not evidence or proof of a defendant's guilt and no weight
5 or significance whatsoever is to be given to the fact that
6 an indictment has been returned against a defendant. He has
7 pleaded not guilty and thus the government has the burden
8 of proving the charges beyond a reasonable doubt. A
9 defendant does not have to prove his innocence. On the
10 contrary, he is presumed to be innocent of the accusations
11 contained in the indictment. This presumption of innocence
12 was in his favor at the start of the trial, as I believe
13 I told you when you were selected, it continues in his favor
14 and remains in his favor during the course of your de-
15 liberations in the jury room. The presumption of innocence is
16 removed only if and when you the jury are satisfied that
17 the government has sustained its burden of proving the
18 guilt of the defendant beyond a reasonable doubt as to a
19 charge that you are considering. Of course unless you are
20 so convinced you must find him not guilty. Now, the question
21 naturally comes up what is a reasonable doubt. Well, members
22 of the jury, those words almost define themselves. That is
23 a doubt founded on reason, arising out of the evidence
24 in the case or the lack of evidence. It is a doubt which
25 a reasonable person has after carefully weighing all the

2 evidence. A reasonable doubt is a doubt that appeals to
3 your reason, to your judgment, to your common sense and
4 your experience. It is not caprice or whim or speculation
5 or conjecture or suspicion. It is not an excuse to avoid
6 the performance of an unpleasant duty and it is not sympathy
7 for a defendant. If after a fair and impartial consideration
8 of all the evidence you can candidly and honestly say you
9 are not satisfied of the guilt of a defendant, that you do
10 not have an abiding conviction of the defendant's guilt of
11 the particular charge, in sum if you have such a doubt as
12 would cause you as prudent persons to hesitate before acting
13 in matters of importance to yourselves, then you have a
14 reasonable doubt and in that circumstance it is your duty to
15 acquit. On the other hand, if after an impartial and fair
16 consideration of all the evidence you can candidly and
17 honestly say you do have an abiding conviction of a defendant's
18 guilt, such a conviction as you would be willing to act upon
19 in important and weighty matters in the personal affairs of
20 your own life, then you have no reasonable doubt and under
21 those circumstances it is your duty to convict.

22 Reasonable doubt does not mean proof to a posi-
23 tive certainty or beyond all possible doubt. If that were the
24 rule few men, however guilty they might be, would ever be con-
25 victed because it is practically impossible for a person to be

1 rgh 125

2 absolutely and completely convinced of any controverted
3 fact which by its nature is not susceptible of mathematical
4 certainty. For that reason the law in a criminal case is
5 that it is sufficient if the guilt of a defendant is
6 established beyond a reasonable doubt, not beyond all
7 possible doubt. This case presents two separate counts for
8 your consideration. Each count is a separate crime, it
9 charges a separate crime, and they must each be considered
10 separately. You will be asked to give a separate verdict
11 as to each count. Mr. Seijo here is the only defendant
12 on trial before you and he is the only person whose guilt
13 or innocence you will be asked to announce in your verdict,
14 although as I will explain to you shortly in considering
15 his guilt or innocence you may have to determine the nature
16 of the participation, if any, of Leonard Torres, Nicholas
17 Hildebrandt, James DiDomenico or others. But in the determina-
18 tion of innocence or guilt you must bear in mind that guilt
19 is personal. The guilt or innocence of a defendant on
20 trial before you must be determined separately with respect
21 to him, solely on the evidence presented against him, or
22 the lack of evidence. The case of a defendant stands or
23 falls upon the proof or the lack of proof of the charge
24 against him and not somebody else. Now, you are not to
25 speculate as to why Hildebrandt or DiDomenico or the others

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2 are not on trial before you at this time. That's not
3 a matter of your concern, nor is the fact that Torres
4 has testified that he was convicted on his plea of guilty
5 in this case any evidence of Mr. Seijo's guilt, and you
6 are not to concern yourselves as to what has been referred
7 to as a prior proceeding or a prior trial. Specifically
8 you are not to speculate as to who the people were who
9 were in these prior proceedings or what the outcome of
10 those proceedings was. You are to decide this case on the
11 evidence before you in accordance with my instructions.
12 Now, for your guidance in considering the evidence you have
13 heard I must tell you there are two classes of evidence
14 recognized and admitted in the courts of justice, upon either
15 of which the jurors may find an accused guilty of a crime.
16 One is called direct evidence and the other is called cir-
17 cumstantial evidence.

18 Direct evidence tends to show the fact in issue
19 without any need for any other amplification, although of
20 course there is always the question as to whether it is to
21 be believed. Circumstantial evidence is evidence that tends
22 to show the facts from which the fact in issue may reasonably
23 be inferred. It is evidence which tends to prove the fact
24 in issue by proof of other facts which have a legitimate
25 tendency to lead the mind to infer or conclude that the

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2 facts sought to be established are true. There is a
3 very traditional example given. Sometimes it is difficult
4 to tell merely by looking out the window of a high building
5 whether it is raining outside or not, but if you see people
6 passing by in the streets and have their umbrellas up...
7 usually come to the conclusion that it is raining. You
8 can't see the rain, but you have direct evidence, the evidence
9 of your own senses that the umbrellas are up and that
10 constitutes circumstantial evidence from which you are
11 entitled to conclude that it must be raining. In other
12 words, circumstantial evidence consists of facts proved
13 from which the jury may infer by a process of reasoning
14 other facts in issue. Circumstantial evidence, if believed,
15 is of no less value than direct evidence for in either
16 case you must be convinced beyond a reasonable doubt of the
17 guilt of the defendant before he may be convicted. Now,
18 in determining what evidence you will accept you must
19 make your own evaluation of the testimony given by each of
20 the witnesses and determine what you believe to be the truth
21 and the degree of weight you choose to give that testimony.
22 The testimony of a witness may fail to conform to the facts
23 as they occurred because the witness is intentionally telling
24 a falsehood, or because the witness did not accurately
25 see or hear what he testified about, or because his recollection

2 of the event is faulty, or because he has not expressed
 3 himself clearly in giving testimony. There is no magic
 4 formula by which you can evaluate testimony. You bring into
 5 this courtroom all of the experience and background
 6 of your lives. In your everyday affairs you determine
 7 for yourselves the reliability of statements made to you
 8 by other people. The same tests you use in your everyday
 9 dealings are the tests which you apply in your deliberations.
 10 You may of course consider the interest or lack of interest
 11 of any witness in the outcome of this case. A witness
 12 who is interested in the outcome of a case is not necessarily
 13 unworthy of belief. The interest of a witness however
 14 is a factor or a possible motive which you may consider
 15 in determining the weight and credibility to be given
 16 to his testimony. In doing this you may also consider the
 17 testimony of a witness is corroborated by the testimony
 18 of others or by documentary evidence or by exhibits. You
 19 may also consider the bias or prejudice of a witness, if
 20 there be any, and the manner in which a witness gives
 21 his testimony on the stand, the appearance and conduct
 22 of the witness in giving his testimony, the opportunity
 23 the witness had to observe the facts concerning which he
 24 testifies to and the probability or improbability of the
 25 testimony in the light of all the other events in the case.

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2 You may also consider whether the witness had any
3 motive to lie. These are all items to be taken into your
4 consideration in determining the truthfulness and weight,
5 if any, which you will assign to that witness' testimony.
6 If such considerations make it appear that there is a
7 discrepancy in the evidence you will have to consider whether
8 this may be reconciled by fitting the two witnesses'
9 testimony together. If that is not possible you will
10 then have to determine which of two or more conflicting
11 versions you will accept. The testimony of a police officer
12 or a detective is not entitled to any greater weight or
13 credibility simply by reason of his occupation or employment.
14 You will evaluate his testimony in the same fashion as
15 that of any other witness in the case. If you find that
16 any other witness has wilfully testified falsely as to a
17 material fact you may, but you need not, disregard the entire
18 testimony of that witness on the principle that one who
19 testifies falsely about one material fact may testify falsely
20 about everything, but you are not required to consider such
21 a witness as totally unworthy of belief. You may accept
22 so much of his testimony as you deem true and disregard
23 that which you believe is false. You as sole judges of
24 the facts determine which of the witnesses you will believe,
25 what portion of their testimony you will accept and what

weight to give to it. In the prosecution of crimes the government is often called upon to use witnesses who are accomplices in the commission of the crime itself. This is particularly so in cases of conspiracy. Conspirators do not publicly proclaim their intentions to operate openly and it often happens that only members of the conspiracy have evidence which is relevant to and important in the case. However, experience has shown that accomplices may be motivated to place the responsibility on others than themselves.

Leonard Torres is an accomplice. An accomplice's testimony should be closely examined, weighed with care, checked with the facts which you find to exist in this case and against the evidence which may corroborate them, and then you should give the testimony such value or weight as you deem appropriate under the circumstances. In the federal courts accomplice testimony by itself may be sufficient to convict if, but only if it convinces you beyond a reasonable doubt. It is of course proper for you to consider the interest which a witness has in the outcome of a case, whether that witness be a defendant himself, a government witness, a defense witness or an accomplice witness. A few more words about the testimony of the witness Leonard Torres. He testified concerning his prior convictions for narcotics

1 crimes. You may consider these prior convictions in deciding
2 whether his testimony has been truthful and what weight,
3 if any, to give to his testimony. It is one of several
4 factors for your consideration in determining his credibility
5 and weighing his testimony. Torres also admitted that
6 he had lied when he testified in this court previously
7 by failing to disclose a marijuana conviction in North
8 Carolina which was a felony there, but he offered an
9 explanation as to his false testimony. If you consider
10 his explanation to be satisfactory you need not regard
11 his prior testimony as being a purposeful falsehood nor
12 need you conclude that he committed perjury on that occasion.
13 But if you find that Torres intentionally perjured himself
14 about his prior marijuana conviction in North Carolina,
15 this means that he is an admitted perjurer and you are
16 instructed that the testimony of an admitted perjurer should
17 always be considered with caution and weighed with great
18 care. These are matters for your consideration in determining
19 what weight to give to his testimony and as I mentioned before,
20 these questions and all questions about the facts or about
21 the weight or credibility of testimony or significance of
22 evidence are questions for your sole consideration. Now,
23 the law permits a defendant upon his request to testify
24 in his own behalf. The testimony of the defendant is before
25

1 you and you must determine how far it is credible. The
2 deep personal interest which every defendant has in the
3 result of his case should be considered in determining
4 the credibility of his testimony. You are instructed
5 that interest may create a motive for false testimony
6 and the greater the interest the stronger is the temptation
7 and that the interest of a defendant is of a character
8 possessed by no other witness and is therefore a matter
9 which may affect the credence that should be placed on that
10 testimony. However, that is also a matter entirely for you
11 to determine using your own common sense and considering
12 all the evidence in the case. Now, the law permits you in
13 determining whether guilt has been proved beyond a reasonable
14 doubt to consider along with all the other evidence in the
15 case the conduct of a defendant including statements knowingly
16 made and acts knowingly done upon being informed that a
17 crime has been committed. When a defendant voluntarily
18 and intentionally offers an explanation or makes some
19 statement tending to show his innocence and this explanation
20 or statement is later shown to be false, the jury may
21 consider whether this action by a defendant points to
22 a consciousness of guilt. Ordinarily it is reasonable to
23 infer that an innocent person does not usually find it
24 necessary to invent or fabricate an explanation or statement
25

tending to establish his innocence. The government contends in this case that the defendant Seijo when arrested by Sergeant Flynn on the evening of June 5, 1974, knowingly made the false statement that he was waiting for his girlfriend. The defendant denies that he ever made any such statement to Sergeant Flynn. This is an issue of fact for you to decide. If you find that the defendant gave a false statement to a law enforcement official in an attempt to exculpate or exonerate himself, you may consider whether such a false statement is circumstantial evidence from which consciousness of guilt of criminal intent may be inferred, for as I mentioned before it is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate an explanation or statement tending to establish his innocence. Whether or not there is any evidence of a false, exculpatory statement by this defendant and whether or not such evidence, if you find any in the case, points to a consciousness of guilt and the significance, if any, to be attached to any such statement are all matters for your own determination. A false statement is knowingly made if made voluntarily and intentionally and not because of mistake or accident or some other innocent reason and the jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden

or duty of calling any witnesses or producing any testimony.

During the trial you heard some transcriptions or tapes.

Members of the jury, the whole question of eavesdropping is a matter of serious philosophical dispute in the country today and I know that there are many people who believe that nothing should ever be taped and others who believe that it is perfectly all right to listen in on everything. These great issues are not your concern in this case.

Obviously a party to a conversation, in this case Detective Scamardella, can testify to the conversation and if he can testify to what was said it is perfectly proper to have a transcript or tape which can also testify to what was said. A tape is often used to corroborate the oral testimony of a witness who was the party to a conversation and that is all that was sought to be done in this case. You are to decide the case fairly on the basis of the facts and the law and by giving a verdict here you are not asked to determine whether or not you agree with the policies or the laws relating to tapes. Now let us turn to the specific charges against this defendant in this indictment.

The first count charges that the defendant Angelo Seijo and Leonard Torres, Nicholas Hildebrandt and James DiDomenico and others conspired to violate the federal narcotics laws. The count 1 I am referring to is the

conspiracy count and it reads as follows:

The Grand Jury charges:

1. From on or about the 1st day of April, 1974, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Nicholas Hildebrandt, Leonard Torres, Angelo Seijo, James DiDomeninco, the defendants, and others to the Grand Jury unknown, unlawfully, unintentionally and knowingly combined, conspired, confederated and agreed to go and with each other to violate Sections 8123, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute schedule 1 narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1) and 841 (b)(1)(A) of Title 21, United States Code. In pursuance of the said conspiracy and to effect the objects thereof the following overt acts were committed in the Southern District of New York. It then lists three acts and I will read the alleged overt acts to you very shortly. Now, members of the jury, the essence of the crime of conspiracy is an agreement or an understanding to violate other laws. It is an entirely

1 rgh 136

2 separate and different crime from the substantive offense
3 to which is the object of the conspiracy. Before you may
4 convict the defendant of the crime of conspiracy each of
5 the following essential elements must be established to
6 your satisfaction "beyond a reasonable doubt.

7 I will now give you the elements of the crime
8 of conspiracy. First, the existence of a conspiracy as
9 described in the indictment from on or about April 1, 1974,
10 and continuously thereafter up to and including June 5, 1974,
11 to distribute heroin and to possess heroin with the intent
12 to distribute.

13 Second, that the defendant Angelo Seijo associated
14 himself with the conspiracy and he became a member of it
15 and the third, that one of the conspirators committed
16 at least one of the overt acts set forth in the indictment
17 at or about the time alleged in the Southern District of
18 the State of New York. Those are the three separate elements
19 and if the government fails to establish each of those
20 three essential elements beyond a reasonable doubt then
21 you must acquit the defendant on the conspiracy count.
22 If the government succeeds in its proof it is your duty
23 to convict him on that count. Now, what is a conspiracy?
24 Well, a conspiracy for our purposes is simply a combination
25 or an agreement among two or more persons to commit a crime.

1 rgh 137

2 A conspiracy is sometimes called a partnership in a
3 criminal venture. To establish the existence of a conspiracy
4 the government is not required to show that two or more
5 persons sat around a table and entered into a solemn pact
6 orally or in writing stating that they formed a conspiracy
7 to violate the law setting forth the details of their plans,
8 the means by which the unlawful project is to be carried
9 out or setting forth the part to be played by each conspirator.
10 Indeed it would be extraordinary if there were ever such
11 a formal document or specific oral agreement. Your common
12 sense will tell you that when men and women undertake to
13 enter into a criminal conspiracy much is left to unexpressed
14 understandings. Conspirators do not usually reduce their
15 agreements to writing or publicly broadcast their plans.
16 From its very nature a conspiracy is almost invariably
17 secret in its origin and execution. It is sufficient to
18 prove the existence of a conspiracy if two or more persons
19 in any manner through any contrivance, impliedly or tacitly,
20 come to a common understanding to violate the law together.
21 Express language or specific words are not required to
22 indicate assent or attachment to a conspiracy. In determining
23 whether there has been an unlawful agreement you may judge
24 acts and conduct of the alleged conspirators which are done
25 to carry out an apparent criminal purpose. The old adage,

1 rgh 138

2 actions speak louder than words, is applicable here.

3 Usually the only evidence available is that of disconnected
4 acts which, however, when taken together in connection with
5 each other may show the existence of a conspiracy to secure
6 a particular result just as satisfactorily and conclusively
7 as more direct proof would show. Proof concerning the
8 accomplishment of the objects of a conspiracy may be the
9 most persuasive evidence of the existence of the conspiracy
10 itself. Success of the venture, if you believe it was
11 successful, may be the best proof of the existence of the
12 agreement. However, the offense is complete when the unlawful
13 agreement is made and any single overt act to effect the
14 object of the conspiracy is thereafter committed by at
15 least one of the conspirators and the crime of conspiracy
16 is committed whether or not the defendants accomplished
17 successfully what it is alleged that they conspired to do.
18 Now, the second element as I mentioned is proof of membership
19 in the conspiracy, individual membership. If you do conclude
20 that a conspiracy as charged did exist, then you must
21 consider whether the defendant Seijo was a member of that
22 conspiracy. That is whether he participated intentionally
23 in the conspiracy with knowledge of its unlawful purposes
24 and in furtherance of its unlawful objectives. To find
25 that the defendant was a member of the conspiracy you must

1 rgh 139

2 find that he knowingly and intentionally participated
3 therein. Thus mere knowledge of the existence of the
4 conspiracy or mere knowledge of any illegal act on the part
5 of an alleged conspirator or mere association with one
6 or more of the conspirators is not sufficient to establish
7 Seijo's membership in the conspiracy.

8 The government must prove beyond a reasonable
9 doubt that this defendant was aware of its basic purposes
10 and objects; that it entered into the conspiracy with a
11 specific criminal intent, that is, with a purpose to violate
12 the law. So if a defendant with understanding of the,
13 unlawful character of the conspiracy intentionally engages
14 in actions or advises or assists for the purpose of furthering
15 the illegal undertaking, in this case the distribution,
16 and sale of heroin, he thereby becomes a knowing and wilful
17 participant and a conspirator. A single act of the defendant
18 such as accompanying a conspirator to assist him in the
19 sale of heroin may be sufficient to draw him within the
20 ambit of the conspiracy. However, since conviction for
21 conspiracy requires an intent to participate in the unlawful
22 enterprise, the single act itself must be such that you
23 may reasonably infer from it such an intent or there must
24 be independent evidence of his own acts or statements to
25 prove that this defendant had some knowledge of the broader

1 rgh 140

2 conspiracy beyond his single act. Now, during the course
3 of the trial reference has been made to Exhibit 4 which
4 is said to be 7.6 grams of heroin said to have been in
5 the defendants' possession and left by him in the police
6 car while he was handcuffed. Now, the possession of this
7 heroin if you find that he had it is not charged as a
8 criminal act in this case. You are not to speculate why
9 this is so nor is the possession of this small amount of
10 heroin in Exhibit 4, if indeed he had it, to be regarded
11 by you as prejudicing the defendant in your minds in any
12 way as to the crimes charged herein. But if you find that
13 the defendant was in possession of this heroin and that
14 this Exhibit 4 bore some identifiable relationship to
15 the other heroin which is alleged to have been distributed
16 as a part of this conspiracy, it could be considered by you
17 as some evidence of the defendant's membership in the
18 conspiracy with knowledge of the unlawful purpose of the
19 conspiracy. Also it may tend to corroborate Torres' testimony
20 that he saw Mr. Seijo take this sample earlier, this exhibit,
21 and the testimony concerning it can only be considered by
22 you for these limited purposes and not as proof of possession
23 of the other heroin referred to in the case by Mr. Seijo.
24 Of course if you don't believe that Seijo was the one who
25 placed or left the heroin in Exhibit 4 in the police car,

1 then you must disregard that exhibit entirely and you put
2 it entirely out of your considerations in the case. You
3 will recall that I have said that the defendant must have
4 acted knowingly, wilfully and intentionally. What do these
5 words mean? They mean deliberately; they mean intentionally.
6 In other words, you must be satisfied beyond a reasonable
7 doubt that the defendant acted with knowledge, consciously
8 in an exercise of his own will. The words knowingly and
9 wilfully are opposed to the idea of an inadvertent or
10 accidental occurrence. An act is done knowingly if it is
11 done voluntarily and purposefully and not because of mistake
12 or accident or mere neglect or some other innocent reason.
13 An act is done wilfully if it is done knowingly and de-
14 liberately.
15

16 Wilfully does not mean that the defendant in ad-
17 dition to knowing what he was doing must also suppose that
18 he was breaking any particular statute. Now, knowledge
19 and intent exists in the mind. It is not possible to look
20 into a man's mind to see what went on and the only way
21 you have for arriving at a decision in these questions,
22 is to take into consideration all the facts and circumstances
23 shown by the evidence, through the exhibits, and to determine
24 from all such facts and circumstances whether the requisite
25 knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred by you from all the surrounding circumstances. Now, the third element of the crime of conspiracy is that one of the conspirators must have committed an overt act as alleged in the indictment in furtherance of the conspiracy. An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that while parties might conspire and agree to violate the law, after they reach that agreement they may change their minds and they may do nothing to carry it into effect and if that happens, if it was only talk, then no crime has been committed. The overt act need not be a criminal act in itself nor it need be the very crime which is the object of the conspiracy. It is not necessary for the government to prove that each member of the conspiracy committed or participated in any particular overt act since the act of any one conspirator done in furtherance of the conspiracy becomes the act of all of the other members. Also the government is not required to prove each overt act alleged in the indictment. The overt acts charged in this indictment which I told you a moment ago I would read later on are as follows.

1. On or about the 11th day of April, 1974, the

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2 defendants Leonard Torres and James DiDomeninco were in the
3 vicinity of Latting and Edward Avenue, Bronx, New York.

4 2. On or about the 18th day of April, 1974,
5 the defendant Leonard Torres was in the vicinity of Latting
6 and Edward Avenue, Bronx, New York.

7 3. On or about the 5th day of June, 1974, the
8 defendants Nicholas Hildebrandt, Leonard Torres and Angelo
9 Seijo were in the vicinity of Southern Boulevard and Fordham
10 Road at the Howard Johnson's restaurant in the Bronx, New
11 York.

12 Now, I instruct you, members of the jury, that
13 Bronx County is part of the Southern District of New York.
14 That is all that I have to say with respect to the
15 conspiracy count and I will now turn to the other count
16 in the indictment. This count charges the defendant Seijo
17 with an actual or substantive violation of the federal
18 narcotics laws; that is that on June 5, 1974, the defendant
19 either distributed or possessed with intent to distribute
20 heroin. It reads as follows:

21 The Grand jury further charges on or about
22 the 5th day of June, 1974, in the Southern District of New
23 York Leonard Torres, Nicholas Hildebrandt and Angelo Seijo,
24 the defendants, unlawfully, intentionally and knowingly
25 did distribute and possess with intent to distribute a schedule

1 rgh 144

2 narcotic drug controlled substance, to wit, approximately
3 259.5 grams of heroin.

4 Now, the elements of this crime are as follows:

5 The first element of this crime will be satisfied
6 if you find that the defendant either intentionally dis-
7 tributed or knowingly possessed heroin with an intent to
8 distribute. If you find either distribution or possession
9 with intent to distribute, this element is satisfied even
10 though as I read it to you the word and is used instead
11 of the word or. The word distribute means the actual
12 constructive or attempted transfer of the drug. The word
13 possession means either actual, physical possession of the
14 heroin, that is to say, having it in your hands, or such
15 power or control over the heroin that the defendant could
16 move it himself or cause others to move it or deliver it
17 at his direction. That is what is known as constructive
18 possession. The word intent refers to a person's state of
19 mind. Thus the term possess with intent to distribute means
20 to control possession of a narcotic drug with a state of
21 mind or a purpose or an intent to transfer it or cause it
22 to be transferred to such a customer.

23 The second element is that the substance which was
24 distributed or possessed with intent to distribute was
25 in fact heroin. This second element is satisfied if you

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2 believe the stipulated testimony of the chemist that the
3 contents of Exhibit 3 is herein.

4 The third element is that in distributing heroin
5 or in possessing it with intent to distribute it the
6 defendant acted knowingly and wilfully. As to this element
7 you should consider and apply all that I have previously
8 instructed you on the subject of what constitutes knowing
9 and wilful behavior and unlawful participation in a crime.

10 Now, as to this count, it is not necessary
11 that the government show that the defendant Seijo himself
12 actually committed the crime charged; that he himself
13 actually distributed or possessed with intent to distribute
14 the heroin. The law provides in this regard that a person
15 who aids and abets another to commit a crime is just as
16 guilty of that crime as if he committed it himself. Therefore,
17 you may find the defendant guilty of this count if you
18 find beyond a reasonable doubt that he, the defendant Seijo,
19 aided or abetted one of the other named persons in the
20 commission of this crime. Before you can convict a defendant
21 of aiding and abetting you must be satisfied beyond a
22 reasonable doubt that the crime itself was committed by
23 Torres or Hildebrandt and that this defendant consciously
24 associated himself with the crime with the intent that
25 his conduct would help it succeed. You must be convinced

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2 beyond a reasonable doubt that he was knowingly and
3 wilfully doing something to aid the commission of the crime
4 by Torres or Hildebrandt or both of them or to forward
5 the commission of that crime by either or both of them;
6 that he was a conscious and knowing participant in the
7 crime with a stake in its outcome or a purpose to make
8 it succeed rather than just a mere witness or a spectator
9 or bystander on the scene of a crime committed by another.
10 A few concluding remarks, members of the jury.

11 Under your oath as jurors you cannot allow any
12 consideration of the punishment which may be inflicted
13 upon the defendant if convicted to influence your verdict
14 in any way or in any sense to enter into your deliberations.
15 The duty of imposing sentence rests exclusively with the
16 court and your function is to weigh the evidence in the
17 case and to determine whether or not the government has
18 proved the defendant's guilt beyond a reasonable doubt
19 as to either or both of these counts solely upon the basis
20 of such evidence and the law. You are to decide the case
21 upon the evidence and the evidence alone and you must not
22 be influenced by any assumption or conjecture or sympathy
23 or any inference not warranted by the facts until proven
24 to your satisfaction. If you fail to find beyond a reasonable
25 doubt that the law has been violated you should not hesitate

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2 for any reason to find a verdict of acquittal. But on
3 the other hand if you should find that the law has been
4 violated as charged you should not hesitate because of
5 sympathy or any other reason to render a verdict of guilty
6 as a clear warning that a crime of this character may not
7 be committed with impunity. The public is entitled to be
8 assured of this. Now, a word about deliberating. Each juror's
9 vote is equal to that of every other juror and each juror
10 is entitled to his or her own opinion. Each of you should,
11 however, exchange views with your fellow jurors. Talk it
12 over. That is the very purpose of jury deliberations, to
13 discuss and consider the evidence, to listen to the arguments
14 of your fellow jurors and to do so patiently and courteously,
15 to present your individual views, to consult with one an-
16 other and to reach a verdict based solely and wholly on
17 the evidence if you can do so without violence to your
18 individual judgment, but each one must decide the case for
19 himself or herself after discussion with your fellow jurors,
20 but you should not hesitate to change an opinion which you
21 hold which after discussion with your fellow jurors appears
22 erroneous in light of the discussion viewed against the
23 evidence and the law. However, if after carefully weighing
24 all the evidence and listening to the arguments of your
25 fellow jurors you entertain a conscientious view that differs

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2 from the rest you are not to yield your judgment simply
3 because you are outnumbered or outweighed. Your final
4 vote must reflect your individual conscientious judgment
5 as to how this case should be decided. As to any count or
6 as to either count a verdict must be unanimous. Now, in
7 the course of your deliberating you may desire to have some
8 part of the testimony read to you. If so I ask you first
9 to discuss it and exhaust your collective recollection
10 and please to be specific about what you wish to have
11 read so that there will be no difficulty locating it. Do
12 not call upon us to read testimony unless you believe it is
13 reasonably necessary for your purposes. It may be that
14 you will want to see one of the exhibits or perhaps all of
15 the exhibits. You may find that you are uncertain as to
16 the meaning of some part of my instructions. Now, in any
17 such case if there is anything you need to assist you in
18 your work you will send out a note to the court through
19 the foreman. Now, all communications will be signed and
20 delivered to the marshal by Mr. Riano, juror number 1,
21 who is the foreman of this jury, and I should admonish you
22 at this time to please do not indicate in your note as
23 to how the jury may be divided, or what the vote may be
24 or anything like that. That is not to be disclosed in any
25 note. If you ask for a copy of the indictment by note that

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2 will be sent in to you, but as I noted to you before
3 the indictment is merely a charge or an accusation and
4 it has no status as evidence. Let me finally sum up your
5 duty in terms of the oath that you took when this case
6 began, and that is without fear or favor to anyone you will
7 well and truly try the issues between this defendant
8 and the government of the United States based solely upon
9 the evidence and the court's instructions as to the law.
10 It is important to the defendant, it is important to the
11 government.

12 At this time would the clerk please swear the
13 marshals.

14 (The marshal was sworn.)

15 (Two alternate jurors excused.)

16 THE COURT: Members of the jury, I am going to
17 ask the rest of you to remain seated where you are while
18 I confer with the attorneys in the next room and see if
19 there are any additional instructions which they would
20 like to have me mention to you or anything I may not have
21 covered in my previous statement.

22 Now, in this regard I ask you not to discuss the
23 case while seated in the box because it is possible I might
24 find it proper to give you additional instructions which
25 you may not yet have received, so please remain in the box.

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2 Don't discuss the case and be in the custody of the U.S.
3 Marshal while I confer with the attorneys.

4 (In the robing room.)

5 THE COURT: Mr. Fortuin, do you have any other
6 requests?

7 MR. FORTUIN: No, your Honor.

8 THE COURT: Mr. Lipson, any exception you took
9 earlier today you need not repeat and your record will be
10 deemed protected as to that and as to your requests to
11 charge. Is there anything other or further that you wish
12 to take up with me at this time?

13 MR. LIPSON: Your Honor, I would like to note my
14 objection to your Honor's reference to the protection of
15 the public at the conclusion of your charge.

16 THE COURT: I have to say to you that that
17 charge has been approved many, many times in this circuit
18 and is certainly appropriate in a narcotics case. All right,
19 for what good it is you may have an exception as to that.

20 MR. LIPSON: Your Honor, there is one other
21 matter which we haven't directed our attention to. We have
22 that problem with the blackboard with the diagram.

23 THE COURT: I instructed Mr. Fortuin to produce
24 an accurate replica of that diagram and I asked him to
25 mark it in evidence. I do remember that at one point he

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2 tendered you a copy of that drawing and I don't remember
3 you saying that was satisfactory or not.

4 MR. LIPSON: He did show me the drawing and as
5 I recall it was identical to the blackboard and I would
6 have no objection to our marking it now so in the event
7 the jury asks for that we can hand it in without any problem.

8 THE COURT: I will mark it now at this time
9 to complete the record, but whether they would be able
10 to refer to the diagram itself by carrying it out to them
11 or having them come in the courtroom I will reserve further
12 decision on. That must be done because that can be erased
13 overnight by the custodial staff and then there might be
14 an argument as to what was on it. You have to protect
15 your record when you use the blackboard. Please give
16 it to the clerk.

xx17 (Government Exhibit 14 received in evidence.)

18 THE COURT: Anything further?

19 MR. LIPSON: No.

20 THE COURT: All right.

21 (In open court.)

22 THE COURT: Members of the jury, I have nothing
23 further to say to you at this time and I ask you to withdraw
24 to the jury room and commence your deliberations, please.

25 (At 3:45 P.M. the jury commenced deliberations.)

2 THE COURT: We will be in recess. Please don't
3 go too far away so the clerk can find all of you.

4 (Recess.)

5 (At 5:20 P.M. a note was received from the jury.)

6 (Jury not present.)

7 THE COURT: Gentlemen, I have a note received
8 at about 5:20 marked Court's Exhibit 2 for identification.

9 We would like the copy of the Judge's ruling
10 on the two charges and it is signed by Mr. S. Joriano.
11 The note is not entirely clear to me. I believe perhaps
12 we would be well advised to take it up first thing in
13 the morning and let the jury go. I wouldn't give them any
14 copy of my charge. If they want any part read over I
15 would read it to them again.

16 MR. FORTUIN: My only concern, Judge, is perhaps
17 we ought to clarify it now. I hate to send the jury home
18 in what sounds to me like a confused state.

19 THE COURT: It is not necessarily a confused
20 state. They have asked for additional information which
21 I told them they could do.

22 MR. FORTUIN: I don't understand what, your
23 Honor, they mean.

24 MR. LIPSON: We are confused perhaps.

25 THE COURT: I think it best to take it up tomorrow

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2 morning when they are clear in their minds and at that time
3 I will ask them to be more specific about it. The clerk
4 will please bring in the jury.

5 (Jury present.)

6 (Note marked Court Exhibit 2.)

7 THE COURT: Members of the jury, I have received
8 your note and I believe that in view of the hour it would
9 be more convenient for all of us if I were to take up the
10 matter raised by your note with you first thing tomorrow
11 morning, so I will recess for the day and I would like
12 to have you return directly to the jury room in the rear
13 of the courtroom and assemble there at 10 o'clock tomorrow
14 morning. Now, I want to make several points with you before
15 you go. The case should not be discussed by the jurors
16 except when all the jurors are present and able to participate
17 in discussion. Therefore, if any of you meet or anybody
18 happens to come into the room a little bit early, don't
19 discuss the case. Do your deliberating only when you are
20 all together.

21 Secondly, do not discuss the case with any non-
22 juror during the time that you will be home tonight and
23 until you get here tomorrow. Do not read anything in any
24 newspaper or hear any television or speak to any attorney
25 or party or witness and don't visit any address or scene or

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2 place that's mentioned in the evidence. It is absolutely
3 essential that nothing come into your minds which would
4 affect your ability to decide this case except only on the
5 evidence you heard in the courtroom, so please be absolutely
6 certain that you adhere to my rules in that regard. Now,
7 it is also essential that all of you be here tomorrow morning.
8 We have no alternate jurors any more. We must have 12 jurors
9 in order to continue our deliberations, so please take
10 good care of yourselves and be in good health and I will
11 see you all at 10 o'clock tomorrow and at that time I
12 will talk about the note.

13 (At 5:30 P.M. the jury was excused.)

14 THE COURT: Mr. Seijo, you are instructed under
15 the terms of your bail that you are to be here at 10 o'clock
16 tomorrow morning. Do you understand your obligations in that
17 regard?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: I would like all of you to just wait
20 a few minutes so that you don't bump into the jury on their
21 way out of the building. I will see you all in the morning.

22 MR. LIPSON: Your Honor, I am scheduled to appear
23 at 9:45 before Judge Knapp which is two floors below. I should
24 be here by 10.

25 THE COURT: Fine. Try to be as prompt as you can.
See you tomorrow.

(Adjourned to A.M., September 19, 1975.)

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2 UNITED STATES OF AMERICA

3 v.

4 NICHOLAS HILDEBRANDT

5 ANGELO SEIJO

September 19, 1975,
10:00 A.M.

6 (Trial resumed.)

7 --

8 (In open court, jury not present.)

9 THE COURT: My intention is to bring the jury
10 back in and ask them to make their note a little more specific
11 ask them to go out say what they want and inform them I am
12 unable to give them a copy of the charge, but I will be able
13 to read back any part or all parts of it.

14 All right, will the clerk please bring in the jury.

15 (Jury present.)

16 THE COURT: Good morning, members of the jury.
17 I have been thinking about this note and I am going to ask
18 you, as soon as I finish speaking, to please return to the
19 jury room and see if you could give me your request in a little
20 more specific form. First may I say that I have no copy of
21 my instructions which I can give the jury. I read most of it
22 from the notes that I have used in different cases and things
23 that I write out in pencil and I don't have enough copies.
24 It is not the usual practice in this courthouse to give copies
25 of the judge's instructions to jurors. Rather our tradition

1 practice is to read it out loud. Now, I would reread it
2 if you want me to. I would have the court reporter reread it
3 if need be. I would read parts of it. But what I would like
4 you to do, perhaps in the interests of time, and let me assure
5 you first that I am willing to do anything which will assist
6 the jury which the jury wants the court to do in this area.
7 If it is simply a fact that you would like to have the court
8 reenumerate the elements of each charge-- do you remember
9 I gave you the number of elements as to each count which the
10 government must prove beyond a reasonable doubt if they
11 are to obtain a conviction, as to those you could simply tell
12 me that you want the elements read. If you want to have
13 the whole charge read, if there is any particular identifiable
14 part of the charge that you want to have read, I would like you
15 to just specify to me what you would like by discussing it
16 with each other first and then sending out another note. Would
17 you do that? In making this request I certainly don't mean
18 to criticize the note. I know that none of you would under-
19 stand some of the mechanical problems I would have about trying
20 to give you a copy of the charge if that is what is requested
21 here and I assume that is what is being asked for. Now would
22 you please return to the jury room and discuss what you would
23 like and give the marshal another note which would be a
24 little bit more specific.
25

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2 (At 10:10 P.M. the jury returned to the jury
3 room to continue deliberations upon their verdict.)

4 (At 10:17 A.M. a note was received from the jury.)
5 (In open court, jury not present.)

6 THE COURT: I have another note. It says "Your
7 Honor, we request that the element of each charge be read to
8 us. Thank you."

9 That will be marked Court's Exhibit 2.

10 (Note marked Court's Exhibit 3.)

11 MR. LIPSON: Will your Honor reread not merely
12 a statement of what the elements are, but the elaborate dis-
13 cussion of what each element involves?

14 THE COURT: I hadn't intended to do that, Mr.
15 Lipson. Is there a request that I do it?

16 MR. LIPSON: I would request that they be told
17 not only what the elements are, but what is involved with
18 respect to each element. It seems to me if the jury wasn't
19 sure of the elements we can't assume that they are aware of --

20 THE COURT: I will make an effort to summarize what
21 involved in them if that's your request. In the absence
22 of the request, however, I would simply read the elements.
23 Are you sure you want me to do that?

24 MR. LIPSON: Yes, your Honor.

25 MR. FORTUIN: I would assume you would cover

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2 aiding and abetting. Obviously that's critical to the element.

3 THE COURT: They haven't asked me to identify aiding
4 and abetting, but I would list aiding and abetting as an
5 element and I didn't expect to explain what it was, but in
6 view of Mr. Lipson's request I suppose I would have to tell
7 what constitutes aiding and abetting.

8 MR. FORTUIN: My guess is that would be the area
9 where they have problems.

10 (Jury present.)

11 THE COURT: Members of the jury, I have your
12 clarifying note. The body of it reads "Your Honor, we re-
13 quested that the elements of each charge be reread to us.
14 Thank you."

15 It is signed by your foreman.

16 Now, you will remember I discussed the two separate
17 counts or charges and the first one that I discussed was
18 what we had referred to for simplicity as the conspiracy count.
19 I point out to you that before any person may be convicted
20 of the crime of conspiracy each of the following essential
21 elements must be established to the satisfaction of the jury
22 beyond a reasonable doubt. The first of these elements
23 is the existence of a conspiracy as described in the indictment
24 from on or about April 1, 1974, and continuously thereafter up
25 to and including June 5, 1974, knowingly and intentionally

2 to distribute it. That's the first element.

3 The second element. The second element is that
4 the defendant Angelo Seijo knowingly and wilfully associated
5 himself with the conspiracy. In other words, that he be-
6 came a member of it and did so intentionally, knowingly
7 and wilfully.

8 The third element which must be proved is that
9 one of the conspirators named in the indictment committed at
10 least one of the overt acts set forth in the indictment at
11 or about the time alleged and did so in the geographic
12 limits of the Southern District of New York, which I told
13 you before includes Bronx County. I pointed out to you
14 that if the government failed to establish each of those
15 three essential elements to your satisfaction beyond a
16 reasonable doubt then you must acquit the defendant on
17 the first or the conspiracy count and if the government suc-
18 ceeds it is your duty to convict him on that count.

19 Now, I stand ready, members of the jury, if
20 you wish me to do so to explain further any of those words
21 that I have used, such as knowingly and wilfully and in-
22 tentionally or anything else that may be of concern to you
23 with respect to either count.

24 Now, the second or later numbered count which I
25 discussed after I finished my discussion of the conspiracy

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2 count is what we generally refer to for simplicity as the
3 substantive count and that count charges the actual crime
4 of distributing and knowingly possessing heroin with intent
5 to distribute it as distinguished from a criminal agreement
6 to do so followed by an overt act. Now, the elements,
7 the three elements which must be proven to your satisfaction
8 with respect to that count are, first, that this defendant,
9 Angelo Seijo, intentionally, knowingly and wilfully dis-
10 tributed or possessed heroin with intent to distribute, or
11 that he knowingly, wilfully and intentionally aided and
12 abetted that sort of possession or distribution of heroin
13 by someone else who actually did so. I explained all of
14 those words to you, including possession and I will repeat
15 any of those explanations you may want to have me do.

16 The second element of the substantive count is that
17 the substance distributed or possessed was heroin.

18 The third element is that in doing so the defendant
19 must have acted knowingly as opposed to innocently or
20 negligently or as a result of some mistake. Now, I believe
21 that constitutes a response to your question. I want to
22 emphasize my availability and willingness to discuss any
23 other point in my instructions which may be of interest or
24 concern to the jury and I also ask you to please stay where
25 you are for just a few minutes and don't speak with each other

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while you are in the jury box so that I can consult with the attorneys in the event that they may believe that there is something additional I should say in response to your last note. So please be patient and you will resume your deliberations in just a moment.

(At the side bar.)

MR. LIPSON: Your Honor, I will withdraw my request for further instructions. I think this is sufficient.

THE COURT: You understand I am entirely willing to do so if you have any specific request.

MR. LIPSON: I understand.

THE COURT: How about you, Mr. Fortuin?

MR. FORTUIN: If they want further amplification they can request it, your Honor.

(In open court.)

THE COURT: Would you kindly resume to the jury room and resume your deliberations.

(At 10:26 A.M. the jury returned to the jury room to continue their deliberations.)

UNITED STATES of America,
Appellee,

v.

Angelo SEIJO and Nicholas
Hildebrandt, Appellants.

Nos. 644, 681, Dockets 74-2313, 74-2436.

United States Court of Appeals,
Second Circuit.

Argued Feb. 13, 1975.

Decided April 23, 1975.

Defendants were convicted in the United States District Court for the Southern District of New York, Lloyd F. MacMahon, J., of conspiracy to violate federal narcotics laws and distribution of heroin, and they appealed. The Court of Appeals, Holden, J., held that where witness' prior record and false concealment of record, had it been known to jury, would have exerted compelling impact on his credibility which was decisive factor in case and could have affected result, information undisclosed through prosecutorial neglect, that witness who admitted delivering narcotics to police detective and whose uncorroborated testimony provided only evidence connecting defendants with such deliveries, had prior criminal record for possession of marijuana and defendant's false testimony denying any prior conviction deprived defendants of fair trial.

Reversed, new trial granted.

1. Criminal Law ⇨1134(3)

Where evidence that witness had prior criminal record was uncovered after notices of appeal had been filed, Appellate Court would consider claim that such undisclosed information deprived defendants of fair trial rather than remanding to trial court for disposition of claim by way of motion for new trial on ground of newly discovered evidence. Fed Rules Crim.Proc. rule 33, 18 U.S.C.A.

2. Constitutional Law ⇨268(5)

Suppression by prosecution of evidence favorable to accused upon request violates due process, where evidence is material, to guilt or to punishment, irrespective of good faith or bad faith of prosecution.

3. Criminal Law ⇨945(1)

A new trial is not called for at every instance where a combing of prosecutor's files after trial has disclosed evidence possibly useful to defense but not likely to have changed verdict; yet, when reliability of particular witness may be determinative of innocence or guilt, new trial is required if false testimony could in any reasonable likelihood have affected judgment of jury.

4. Criminal Law ⇨919(1)

Where there was neglect rather than prosecutorial misconduct in not disclosing evidence, higher standard of materiality of evidence is required to warrant granting of new trial; the test is whether there was a significant chance that evidence could have induced a reasonable doubt in minds of enough jurors to avoid conviction.

5. Criminal Law ⇨633(1), 700

Despite presence of other impeaching material available to jury, where witness' prior conviction of possession of marijuana and false concealment of prior record, had it been known to jury, would have exerted compelling impact on witness' credibility which was decisive factor in case and could have created sufficient doubt in minds of enough jurors to affect result, undisclosed information that witness who admitted delivering narcotics to police detective and whose uncorroborated testimony provided only evidence connecting defendants with deliveries, had prior criminal record and false testimony denying any prior conviction deprived defendants of fair trial. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 202, 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 812, 841(a)(1), (b)(1)(A), 846.

Michael A. Young (Legal Aid Society), New York City (William J. Gallagher, New York City, on the brief), for appellant Seijo; Sidney M. Offer, New York City, for appellant Hildebrandt.

Thomas M. Fortuin, Asst. U. S. Atty. (Paul J. Curran, U. S. Atty. for the S. D. N. Y., Lawrence S. Feld, Asst. U. S. Atty., on the brief), for appellee.

Before HAYS and FEINBERG, Circuit Judges and HOLDEN,* District Judge.

HOLDEN, District Judge:

Angelo Seijo and Nicholas Hildebrandt appeal from judgments of conviction entered upon jury verdicts returned on July 30, 1974, before the Honorable Lloyd F. MacMahon. The indictment, in Count One, charged Seijo, Hildebrandt, Leonard Torres and James Di Domenico with conspiracy to violate the federal narcotics laws from April 1, 1974, to June 14, 1974, in violation of 21 U.S.C. § 846. Count Two charged Hildebrandt, Torres and Di Domenico with distributing approximately 38 grams of heroin on April 11, 1974. Count Three charged Torres and Hildebrandt with distributing approximately 162 grams of heroin on April 18, 1974. All four defendants were charged with distributing 260 grams of heroin on June 5, 1974. Count Five charged Seijo with possessing, with intent to distribute, approximately 34 grams of heroin on June 5, 1974. Counts Two through Five charged violations of 21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A) (1970) and 18 U.S.C. § 2. Count Six charged Seijo with carrying a firearm during the commission of the felonies specified in Counts One, Four and Five, in violation of 18 U.S.C. § 924(c)(2). This count was severed prior to trial and subsequently dismissed with the consent of the Government.

On the first morning of trial, Torres pleaded guilty to Count One of the indictment and later testified for the Government. The jury found Hilde-

brandt guilty on all counts. Seijo was found guilty on Counts One and Four; he was acquitted on Count Five. Di Domenico was found guilty on Counts One and Two. Hildebrandt and Seijo were sentenced to concurrent terms of fifteen years confinement with three years special parole on each count. Di Domenico was sentenced to a term of imprisonment of five years to be followed by a special parole term of three years. Torres was sentenced to a period of probation for five years on the special condition that he participate in a community narcotic treatment program. Counts Two, Three and Four were dismissed against Torres. Di Domenico did not appeal.

The essence of the Government's case against both appellants resides in the testimony of Leonard Torres. Admitting that he delivered the narcotics charged in the indictment, Torres testified Hildebrandt was his source. Seijo was depicted as the man behind the operation. During the pendency of this appeal, and about five months after the trial, the Government discovered in its files that Torres had lied to the prosecutor after he agreed to cooperate and had falsely testified at the trial in stating he had never been convicted of a criminal offense prior to his arrest in this case. Although the defense had requested this information before the trial, it was reported by the Assistant United States Attorney, in charge of the case, that Torres had no prior record. Approximately four weeks before the trial, on July 2, 1974, a Federal Bureau of Investigation criminal identification sheet was received in the office of the United States Attorney. The report set forth that Torres had a criminal record: that he was convicted in 1969 of possession of marijuana at Fayetteville, North Carolina. He received a suspended sentence of two years and was placed on probation for a four year term and fined \$400. The controlling question for review is whether the undisclosed information and

* Of the United States District Court for the District of Vermont, sitting by designation.

Torres' false concealment of it deprived the appellants of a fair trial.

[1] Since the question was not presented to the trial court, we are called upon to decide the issue on the record presented on appeal.¹ See *United States v. Badalamente*, 507 F.2d 12, 18 (2d Cir. 1974), cert. den. — U.S. —, 95 S.Ct. 1565, 43 L.Ed.2d 776 (1975). In measuring the likely impact of the suppressed material, it is important to first consider the strength of the Government's case apart from the evidence given by Torres.

Detective Joseph Scamardella of the New York City Police Department was assigned to the Drug Enforcement Task Force. On April 10, 1974, Scamardella, posing as a heroin dealer, was introduced by a police informant named Tom Frano, to James Di Domenico and Leonard Torres. The introduction was effected to enable Detective Scamardella to purchase heroin. Torres and Di Domenico told Scamardella that their "source" had an eighth kilogram of heroin for another purchaser, but his man was unwilling to break it up to sell a half ounce. Detective Scamardella informed Torres that he would take a full ounce,—"to see what the stuff was like." A further meeting was set up for the following day, April 11th. The second meeting was in Scamardella's automobile; Frano was his passenger. They were joined by Torres and Di Domenico, who delivered 14 grams of heroin and received \$600 in recorded currency.

A week later, on April 17, 1974, Scamardella telephoned Torres requesting another purchase of heroin. A meeting on April 18th, in the Bronx, resulted in the delivery of a package by Torres of 122 grams of heroin in return for \$4,900 in cash. Detective Arthur Drucker, who had maintained surveillance of the transaction, followed Torres to Nicholas Bench

Bar in the Bronx. Torres emerged from the bar in conversation with appellant Nicholas Hildebrandt. Both returned to the bar and after a short interval Torres departed. Detective Drucker followed Torres' car, but later lost it.

On the following day Detective Scamardella called Torres again in an effort to purchase one and one-half kilograms of heroin. Torres informed him that his "man," mentioning the word "Nick," would be willing to sell a half pound. No sale resulted.

On June 3, 1974, Scamardella called Torres again, seeking to purchase two packages of heroin, of an eighth kilogram each. The following day Torres agreed to supply the two packages for \$9,200. On June 5, Scamardella proceeded to a meeting with Torres at Howard Johnson's Restaurant, located near the Bronx Zoo. Torres, after a telephone call, informed Scamardella that in fifteen minutes they could leave the restaurant and then pick up the narcotics. Scamardella, not wanting to disrupt the surveillance, resisted the move on the pretext that he didn't want to carry \$10,000 in cash to another location. He requested Torres to deliver the packages to him at the restaurant. Torres agreed, but went on to say he would have someone with him, for protection, when he returned.

An hour later Torres returned in a yellow Toyota, which he parked a block away from the restaurant. He was followed by a Chevrolet which was occupied by appellants Hildebrandt and Seijo. They parked two car lengths from the Toyota. Torres approached the Chevrolet and talked to the occupants. Torres returned to the Toyota, removed a brown paper bag and motioned to Seijo. On Torres' signal, Seijo got into the Toyota, made a U-turn and drove at slow speed behind Torres, as he walked to-

discovered evidence. The material upon which the appellants rely was uncovered long after the notices of appeal had been filed. From the record on appeal, we see no useful purpose to be served by a remand.

¹ Without pressing the point, the Government suggests in the margin of its brief that the appellants should have moved for a remand to the trial court for the disposition of their claim under Rule 33, Fed.R.Crim.P., by way of a motion for a new trial on the ground of newly

ward the restaurant parking lot. There Torres approached Scamardella, who was seated in his parked car. Torres delivered the paper bag to Scamardella, who then got out of his car to remove the money from the trunk of his vehicle. In so doing, he signalled the surveillance team that he had the package. As he gave the money to Torres the officers standing by moved in and arrested Torres and Scamardella. The paper bag contained 217 grams of heroin. The appellant Hildebrandt was arrested in the Chevrolet parked a short distance away from the restaurant. The appellant Seijo was arrested in the Toyota which he had parked headed in and against a retaining wall in the restaurant parking area.

Seijo was removed from the Toyota, told to place his hands on the top of the vehicle. In this posture Seijo was frisked, handcuffed and ordered into the left side of the rear seat of a two-door police car. Shortly thereafter Torres was brought to the same vehicle and seated on the rear passenger side. Seijo was observed by one of the police officers to be moving about in the rear seat; he informed the arresting officers that his handcuffs were too tight. Seijo was taken out of the car and the rear seat was removed. A small package of heroin, identified and received in evidence as Government's 4, was retrieved from the area under the left rear seat. Count Five charged Seijo alone with the possession of the package found in the police car and he was acquitted of this charge.²

On the morning following the arrest, Hildebrandt, under questioning by Detective Drucker, stated his source of supply was one Dominick Lessa.³ He described the exclusive method of contact with Lessa. There was no implication of the appellant Seijo in Hildebrandt's statement. Although this testimony in-

dicates Hildebrandt was involved in narcotic traffic, there is no evidence to connect his dealings with Lessa to the narcotics delivered by Torres to Scamardella.

The Government's chemist testified that the substance which Torres delivered to Detective Scamardella on April 11, 1974, and June 5, 1974, matched the composition of the heroin seized from Di Domenico and that found under the rear seat in the police vehicle.

Such is the sum and substance of the Government's proof against the appellants, taken separate and apart from the testimony of Leonard Torres. His testimony provided the only evidence to connect the appellants with the deliveries Torres made to Detective Scamardella.

At the time of trial Torres was twenty-four years old. He testified he first became involved with narcotics while serving in the Army in Vietnam in 1969. He became addicted to opium at that time. In 1970, at Fort Bragg, North Carolina, he received an honorable discharge. After returning to his home in the Bronx, Torres became addicted to heroin to the extent of using, by injection, two or three bags daily. He testified he was not using drugs at the time of his arrest; that he had become a participant in a methadone program in January, 1971 and continued with it at the time of his arrest and during the trial.

Torres testified that he knew Frano and Di Domenico through the methadone program. Frano had asked him if he could supply him with heroin. Torres replied he would find out. Later the defendant Di Domenico told him that Frano had made the same request of him. Torres and Di Domenico agreed to "see if we could get him (Frano) something." According to Torres' testimony they drove to the appellant Hildebrandt's

2. As stated above, the jury acquitted the appellant Seijo of possessing this package which was the subject of Count V. In so doing, they apparently rejected Torres' testimony that earlier in the day he saw Seijo put a small package, 4 1/2" in length, in his front pants pocket.

3. There was no identification of Lessa at the trial. The Government's brief reports that a bench warrant for Lessa's arrest was issued on January 21, 1971, when he failed to appear for trial. Apparently he continued to be a fugitive at the time of trial.

home, where the transaction was arranged, and delivery was made to Detective Scamardella.

Thereafter, in response to a telephone call from Detective Scamardella, Torres testified he met with Hildebrandt at Neckles Beach Bar to arrange the sale of an eighth kilogram of heroin for \$4,900 on April 18, 1974. Torres testified he picked up the narcotics for this deal at Hildebrandt's home and returned the purchase price to Hildebrandt. According to Torres, he received none of the proceeds of this transaction.

The most damaging aspect of Torres' uncorroborated testimony, as it relates to the appellant Seijo, derives from his narrative concerning Frano's subsequent request for three ounces of heroin. Torres stated he obtained the three ounces from Hildebrandt; one in payment for his services in the prior sale, and two ounces for Frano, which Torres said he received on consignment. Torres testified he turned the three ounces over to Frano; but Frano disappeared and has not been found. Hildebrandt informed Torres he was responsible for the two ounces consigned in the amount of \$2,400 and insisted on payment. Later, according to Torres, in the middle of May, Hildebrandt requested Torres to go to Neckles Beach Bar, where he met with Hildebrandt and Seijo. Both appellants asked Torres when he was going to come up with the money. According to Torres, Seijo told him—"Listen, I'm the guy behind the whole thing. I lent Nick all this money, and I want to be paid for it." Later Seijo threatened—"I'll kill you. I'll kill your mother and father all the way up and down the line. I'll throw them in the bay in back, if you don't give me my money."

Torres testified that about two weeks later Detective Scamardella asked him if he could get him two, eighth kilogram packages of heroin. Torres went to Hildebrandt at the Neckles Beach Bar. He

talked only to Hildebrandt, but Seijo was sitting at the bar next to him. Hildebrandt agreed to supply the heroin. When Scamardella called again the meeting at Howard Johnson's was set up for June 5, 1974. Torres testified that at the first meeting at the restaurant he had two friends with him, "Pooch and John" who accompanied him for protection. They were parked across the street.

Torres testified he called Hildebrandt at the Neckles Beach Bar. Hildebrandt directed Torres to proceed to that location. "Pooch and John" followed, but Torres dismissed them en route.⁴ Torres did not tell his friends that he was dealing in narcotics. Torres continued on to Neckles Beach Bar. Hildebrandt was not there so Torres called him at his shop. According to Torres, Hildebrandt and Seijo met him in front of the shop where Torres received the heroin from Hildebrandt. Hildebrandt and Seijo followed Torres to the restaurant. Torres testified that Seijo never handled the package that was delivered to Scamardella. However, he stated that earlier in the day he saw Seijo put a smaller package in his pants pocket.

At the conclusion of his direct testimony Torres was asked by counsel for the Government:

Q. Other than when you were arrested on that night, June 5, 1974, have you ever been arrested before?

A. When I was—when I was a kid we took bats and balls out of a park house.

Q. And were you arrested for that?

A. Yes.

Q. What was the result of that charge? Were you convicted?

A. No. We were dismissed you know. Our parents had to come in and, you know, they said that we would be in their custody and every-

thing to protect, had been made. At one point in the testimony Torres referred to one of these friends as "Nick," when he dismissed them, prior to his return to Howard Johnson's.

⁴ "Pooch and John" were not identified by Torres. No explanation was given as to why they were released at this stage of the transaction and before the payment, they were as-

thing. This is before I was 16. I think I was 14, 15 years old.

Torres was asked on cross examination concerning his involvement with drugs:

Q. Did they ever pick you up in the Army for using—

A. No, sir.

Q. They never picked you up in the Army for using drugs?

A. No, sir.

Q. All right.

This testimony was untrue. At the time it was given, as will later appear, its falsity, although known to Torres, was unknown to the Assistant United States Attorney who conducted the trial.

Seijo testified in his own defense; Hildebrandt did not. Seijo had no prior arrests or convictions. He testified he did not use drugs. He knew the appellant Hildebrandt through the latter's marriage to Mrs. Seijo's cousin; however, he denied any knowledge that Hildebrandt was engaged in narcotic traffic. Seijo testified that he worked on a row boat he had purchased for his son at a boat yard in the vicinity of Neckles Beach Bar on June 5, 1974. He worked with Charles Albrecht, who operated a charter fishing boat.⁵ At various intervals he worked with Hildebrandt, whose boat was also undergoing repairs.

When the boat work was finished the three entered Neckles Beach Bar to drink beer, visit and view television. About eight in the evening Torres arrived and conversed with Hildebrandt out of Seijo's hearing. After Torres' departure Hildebrandt informed Seijo that Torres had offered to pay each of them \$25.00 if they would accompany Torres, for protection, while he attempted to collect some money that was owed him.⁶ With Seijo driving, they gave Albrecht a ride toward his home. After discharging

Albrecht at Pelham Parkway the appellants proceeded to a bar nearby Hildebrandt's sewing shop. After Hildebrandt left the car, to talk with Torres, the appellants followed Torres to the vicinity of the Howard Johnson Restaurant, where they parked the Chevrolet behind Torres' Toyota. Torres asked Seijo to drive the Toyota into the parking lot while Torres went on foot to meet the person who was to bring him the money. Hildebrandt remained in the parked vehicle, partly asleep from having had too much to drink. Seijo observed Torres remove a package from the Toyota and then walk toward the parking lot. Seijo entered the Toyota and made a U-turn. According to his testimony, he reached the parking lot and parked the vehicle. From this point he observed Torres enter a white car, where the delivery of the package to Detective Scamardella was accomplished. Seijo was immediately arrested, frisked and placed in the rear of a police car that had pulled alongside the Toyota.⁷

Seijo denied he had ever threatened Torres. He disclaimed that he had financed any of Hildebrandt's alleged narcotic operations. He testified Hildebrandt never told him he was involved in narcotics traffic and he never saw Hildebrandt give Torres any narcotics. He denied having Government Ex. 4 in his possession.

In summation, the Government characterized Torres as the "kid" less familiar with the ways of the street than his co-conspirators. "He was younger, he was innocent." The jury was called upon to consider his prior record and his arrest at 16 for stealing baseballs, while the record of one of his co-conspirators indicated he "dealt with guns rather than baseballs." The Government stressed Torres' military service. With

5. Albrecht's testimony corroborated Seijo's concerning the events prior to the arrest.

6. This is consistent with Detective Scamardella's testimony that Torres told him, as he left the restaurant, that he would have someone with him for protection on his return.

7. At the time of arrest, Seijo had \$1.56 in his pocket, which was removed and recorded by the arresting officers. Government's Exhibit 4 was not discovered at this time.

respect to Seijo, the Government argued —"it comes down to who do you believe" —Seijo or Torres.

On December 17, 1974, after notice of appeal had been filed, Thomas M. Fortuin, Esq., the Assistant United States Attorney who tried the case, filed an affidavit with the court in which he reported that he had recently discovered the Federal Bureau of Investigation criminal identification sheet referred to earlier in the opinion. Although the identification sheet indicated that it had been received by the United States Attorney's office on July 2, 1974, through an error in a notation on the index card, the document was directed to the Chief of the Criminal Division. Since the Torres case had previously been assigned to Assistant United States Attorney Kaufman, the identification sheet was returned to the file room, where it remained until December, 1974.

The affidavit further showed that prior to the discovery of Torres' conviction record in December, neither Mr. Fortuin nor Assistant United States Attorney Kaufman knew of this prior conviction.⁸

[2] We are not confronted with any intentional suppression on the part of the Government, of evidence favorable to the defendant. Indeed, the record indicates the Assistant United States Attorney, responsible for the prosecution, made known the falsity of Torres' testimony as soon as it was communicated to him. Although those representing the Government acted in good faith, that does not conclude the question. One concern is the possible effect the evidence withheld might have had, if it had

been available to the defense at the time of trial.

(T)he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215.

We recognize that some shadow was cast on Torres' testimony at the instance of the Government. He was cross-examined at length. He admitted that he pleaded guilty to only one of the four counts in the indictment, reducing the possible maximum sentence from 60 to 15 years; that he hoped his cooperation with the Government would be of assistance to him at his sentencing. He also admitted that he had used opium, that he had been addicted to and had sold heroin; that at the time of the trial he was taking methadone. The import of past possession of marijuana pales in comparison with Torres' extensive involvement with "hard" drugs. However, the false denial by Torres on the witness stand of his prior conviction has a different and more serious bearing. In this aspect, it cannot be said to constitute merely cumulative impeaching material.

Although the Government argues that Torres' testimony in denial of any conviction, other than the juvenile offense, was not material to the guilt or innocence of the appellants, it is entirely clear that his testimony was false. His denial in cross-examination of ever having been arrested during his military

⁸ This information was furnished to the court by letter of February 20, 1975, in response to a directive by the panel made during oral argument. These facts are in addition to those set forth in the affidavit to that effect after Torres agreed to cooperate. He told Mr. Fortuin that he had never been convicted of a crime prior to his arrest in this case. When defense counsel requested a copy of Torres' "rap sheet" before trial, Mr. Fortuin asked the police officers of the New York Drug Enforcement Task Force assigned to the case, to determine if Torres had a criminal record. The

officers had checked with the New York State Bureau of Criminal Identification, but records of that agency did not reveal the out-of-state arrest or conviction. These officers informed Mr. Fortuin that they had checked and Torres had no prior convictions. The Government, through Mr. Fortuin, informed defense counsel that Torres had no prior convictions. Apparently no effort was made at this time to re-check Torres' record with the F.B.I., although the Government had resorted to this agency for this particular information before Torres had agreed to cooperate.

service for using drugs was consciously untruthful. Unlike Di Domenico, the fabric of the Government's case against Seijo and Hildebrandt was such that Torres' credibility was the decisive factor. The identification sheet in the Government's possession had the capability of demonstrating that his past criminal conduct was more serious than that of a youthful delinquent. Of greater importance, it is persuasive that his false and conscious concealment of the prior conviction renders the uncorroborated substance of his testimony suspect. Perhaps the North Carolina conviction, had it been disclosed at the trial, would not have seriously damaged Torres' credibility. However, his false concealment of any criminal record in his adult life generates doubt concerning the rest of the evidence he delivered against the appellants.

[3] Of course, we are mindful that a new trial is not called for at every instance where "... a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict ..." *United States v. Kergh*, 391 F.2d 138, 148 (2d Cir. 1968). Yet when the reliability of a particular witness may be determinative of innocence or guilt, a "new trial is required if the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ..." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

[4] Where, as here, there was neglect, rather than prosecutorial miscon-

duct, a higher standard of materiality is required. In this posture, the test—whether there was a significant chance that this added item, developed by skilled counsel ... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction. *United States v. Sperling*, 506 F.2d 1322, 1333 (2d Cir. 1974), *United States v. Miller*, 411 F.2d 825, 832 (2d Cir. 1969).

[5] Applying the test stated in *Miller*, as followed in this circuit,⁹ we are persuaded that despite the presence of other impeaching material available to the jury, Torres' prior conviction and his false concealment of this fact, had it been known to the jury, would have exerted a compelling impact on his credibility as to the unsubstantiated aspects of his testimony. Had the jury known that Torres responded untruthfully, the exposure could have created a sufficient doubt in the minds of enough jurors to affect the result. *United States v. Miller*, *supra*, 411 F.2d at 832.

The taint of Torres' false testimony is not erased because his untruthfulness affects only his credibility as a witness. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence ..." *Napue v. Illinois*, *supra*, 360 U.S. at 269, 79 S.Ct. at 1177. It is so here; the jury was squarely faced with the hard question of whom to believe. See *United States v. Badalamente*, *supra*, 507 F.2d at 15.

Had the source and subject of Torres' untruthfulness on direct examination been disclosed and developed at the trial, the appellants' fate may well have been differently decided. Although the true

9. See *United States v. Pacelli*, 491 F.2d 1108, (2d Cir. 1974), cert. denied, 419 U.S. 826, 95 S.Ct. 43, 42 L.Ed.2d 49 (1974); *United States v. Mayersohn*, 452 F.2d 521 (2d Cir. 1971); *United States v. Houle*, 490 F.2d 137 (2d Cir. 1973), cert. denied, 417 U.S. 970, 94 S.Ct. 3174, 41 L.Ed.2d 1141 (1974); *United States v. Pfingst*, 400 F.2d 262 (2d Cir. 1973), cert. denied, 417 U.S. 919, 94 S.Ct. 2625, 41 L.Ed.2d 224 (1974); *United States v. Fried*, 456 F.2d 201 (2d Cir. 1973), cert. denied, 416 U.S. 983, 94 S.Ct. 2383, 40 L.Ed.2d 759 (1974); *United*

States v. Kahn, 472 F.2d 272 (2d Cir. 1973), cert. denied, 411 U.S. 932, 93 S.Ct. 2270, 36 L.Ed.2d 958 (1973); *United States v. Bonanno*, 430 F.2d 1060 (2d Cir. 1970), cert. denied, 400 U.S. 964, 91 S.Ct. 366, 27 L.Ed.2d 384 (1970).

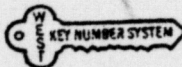
See also, *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974), cert. denied, — U.S. —, 95 S.Ct. 1565, 43 L.Ed.2d 776 (1975); *United States v. Polish*, 416 F.2d 570 (2d Cir. 1969); *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968).

answer to the precise question must remain unknown, enough is established in the record presented to demonstrate that the material withheld sufficiently touches upon the constitutionally protected rights of the appellants and impairs the validity of the verdicts returned against them.

While the Government case against Hildebrandt appears somewhat stronger than that presented against Seijo, the verdicts returned in both instances were similarly composed in the proof. Both convictions are essentially predicated on the now suspect credibility of the crucial witness Torres.¹⁰ We find no occasion to further allocate nor compare the substance of the proof as to the respective appellants.

Since new trials are required, we are not called upon to consider the challenges advanced by the appellant Seijo concerning the validity of his sentence.

The convictions are set aside and new trials ordered as to both appellants.



12/15/75

I hereby certify that
I have mailed
a copy of this
instrument to the
U.S. Atty for the
SDNY.

M. J. A. 47